

1 UNITED STATES DISTRICT COURT
2
3 FOR THE DISTRICT OF RHODE ISLAND
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6 YARON UNGAR, et al

CA No. 00-105 L

7
8 v

PROVIDENCE, RI
14 MAY 2003

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10 PALESTINIAN AUTHORITY, et al

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13 BEFORE MAGISTRATE JUDGE DAVID L. MARTIN
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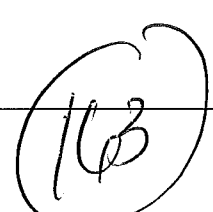
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1 14 MAY 2003

2 THE COURT: This is the matter of the estate
3 of Yaron Ungar, et al v the Palestinian Authority, et
4 al, Civil Action 00-105 L. Before the Court are three
5 motions, defendant's motion for a protective order,
6 plaintiff's motion for judgment by default against
7 Palestinian Authority based on alleged failure to
8 respond to interrogatories, request for production, and
9 request for admissions, and the third motion is
10 plaintiff's motion for judgment by default against
11 Palestinian Authority for refusal to submit to
12 depositions.

13 The attorneys will identify themselves,
14 please.

15 MR. STRACHMAN: David Strachman for the
16 plaintiffs.

17 MR. SCHILLING: Lawrence Schilling for the
18 Palestinian Authority.

19 MR. SHERMAN: Deming Sherman for the same.

20 THE COURT: All right. The Court will first
21 hear the defendant's motion for a protective order.
22 Mr. Schilling, you may proceed.

23 MR. SCHILLING: If your Honor please, I'd
24 like to touch on some of the elements that are common
25 to all three motions.

1 The defendants are the Government of
2 Palestine. It's a functioning Government, and we think
3 meets the definition of the Restatement of foreign
4 relations of the United States in that it is a state.

5 We have informed your Honor, I think on
6 several occasions, that we thought it was extremely
7 important to wait for the final word on immunity and
8 related issues. As an entity entitled to immunity, we
9 were concerned about the burdens of litigation which we
10 thought we had an entitlement to avoid. We thought we
11 had a privilege not to be sued, and what the cases have
12 sometimes referred to as a dignitary interest.
13 Affecting this was the peace process again with which
14 we're very much concerned. It's now the roadmap what
15 we think that this body of litigation, because we view
16 the cases against us as a body of litigation, might
17 have an impact on the peace process, on the roadmap.

18 A third factor is the extraordinary period
19 of five months during which our motion for
20 reconsideration that was filed on November 20, 2002,
21 was pending. This was a motion to reconsider the
22 Court's decision and order entered on November 5, 2002.
23 Once the motion for reconsideration was filed, it
24 wasn't possible for us to take an appeal until the
25 motion was decided. It's unusual because if the motion

1 had been decided more quickly, the proliferation of
2 discovery would not have taken place. We think -- when
3 I said the final word on immunity and related issues,
4 that very much included an appeal and a decision by the
5 Court of Appeals.

6 The plaintiffs doubted during this period
7 that we had a right of appeal, or that we would appeal,
8 in a reply filed at the beginning of March, the
9 plaintiff said an appeal the defendant claims it
10 intends to file at some future date. That same
11 document went on to say, "We're not entitled to an
12 appeal as a right. But even if the defendants had a
13 right, the time to file such an appeal has long since
14 expired." Well, it hadn't expired, and our rights to
15 appeal came into effect on April 22 when the order
16 denying our motion for reconsideration was entered. We
17 immediately filed an appeal and the appeal has been
18 extremely active. We filed a motion for a stay on the
19 same day that we took the appeal. I think your Honor
20 may have the motion for a stay. It was an exhibit to
21 one of our -- one of our documents, and I think we very
22 recently got permission to file the exhibit.

23 THE COURT: Yes, that's correct,
24 Mr. Schilling. I've read the motion for stay and the
25 memorandum in support thereof.

1 MR. SCHILLING: Thank you. In addition to
2 the motion for a stay, the plaintiffs have filed on the
3 appeal an opposition for a stay. They've also filed a
4 motion for summary disposition asking that the appeal
5 be dismissed or that it be summarily disposed of. They
6 asked permission to file a surreply on the stay motion.
7 And in connection both with the stay motion and the
8 summary disposition, plaintiff had requested oral
9 argument. The defendants filed an opposition to the
10 summary disposition, and a reply on the motion for a
11 stay, and there the matter sits. The Court of Appeals
12 has not issued -- has not issued an order, and it seems
13 to us, I guess this is in the nature of an application,
14 that it makes sense to wait a brief time for the Court
15 of Appeals to rule. If it rules against us, then we
16 will have to reassess our position in light of whatever
17 action the Court of Appeals takes. If it rules in our
18 favor, then depending on what they do, the case will
19 have a much different posture.

20 So my suggestion, your Honor, is that we
21 wait a brief period of say a week or two weeks until we
22 see what the Court of Appeals is going to do.

23 THE COURT: Is it your expectation,
24 Mr. Schilling, that the Court of Appeals will take some
25 action within the next week or two on this application

1 for stay?

2 MR. SCHILLING: It's my expectation, but I
3 don't base that on anything that the Court has said. I
4 know that the clerk's office there has said, the clerk
5 said she'd fax to us as soon as she received the order,
6 and I gathered from that that she thinks something will
7 be coming fairly soon. Of course, the stay and the
8 appeal itself may not be decided at the same time. But
9 --

10 You're suggesting that perhaps the Court
11 might grant the stay but not decide the appeal, but
12 simply to stay the proceedings down here in the
13 District Court?

14 MR. SCHILLING: Or might deny the stay and
15 still go on with the appeal, but they might write
16 something, as well, when they take action.

17 THE COURT: All right. Is there anything
18 else you wish to add?

19 MR. SCHILLING: Well, there's a lot on the
20 motions, but on this particular application, I'd say
21 no.

22 THE COURT: The motion for a protective
23 order, which I'm hearing first. Is there anything else
24 you want to argue about that?

25 MR. SCHILLING: Your Honor, there's quite a

1 bit. The depositions of President Arafat and several
2 top leaders were noticed and we think that the
3 foundation for those depositions has not been properly
4 laid. But overriding the entire problem that the
5 motion presents, it is, as I say, our desire to wait
6 until the immunity and related issues are decided, and
7 especially until they are decided by the Court of
8 Appeals. There are problems with practicality. These
9 officials can't leave with any assurance that they will
10 be able to return if they come to the United States.

11 Plaintiffs make the point that we haven't
12 negotiated the details of the depositions with them,
13 and that's true, but again it's because we think we are
14 entitled to avoid the burdens of litigation and to
15 preserve the dignitary interests that are involved.
16 And so a lot of the minutia that Mr. Strachman raises
17 on these depositions, we think is subsumed by this
18 desire of ours which has now been expressed on the
19 appeal. We think there's been no showing that these
20 deponents have any information that would be of
21 interest. We think that the Popandreau case indicates
22 that there should be such a showing before the senior
23 most officials of the government are deposed.

24 But again, the detail of that hasn't been
25 laid out because our basic position is that we think

1 we're entitled to wait until there's a final word on
2 immunity and related issues. Thank you, your Honor.

3 THE COURT: All right. Mr. Strachman.

4 MR. STRACHMAN: Thank you, your Honor.
5 First, if I could, your Honor, in terms of the
6 procedure, procedural issue raised for the first time
7 now by Mr. Schilling, it's not in his motion for
8 protective order, but we have no indication at all that
9 the First Circuit will entertain a motion for a stay.
10 The request was made several weeks ago. The request
11 was made that the Court handle the matter on an
12 emergency expedited matter. As Mr. Schilling
13 explained, we've responded appropriately and there are
14 several pleadings pending before the Court. But it
15 sounds somewhat disingenuous to now come to this Court
16 and say today that the reason we can't take
17 depositions, or the reason we need a protective order,
18 is because of the First Circuit.

19 They filed a motion several weeks ago and
20 your Honor struck probably three quarters of that
21 motion because it was in that Hamas attack upon certain
22 individuals.

23 What's left in their motion is basically a
24 representation by a Dr. Nassar Al-Kidwa who is not the
25 first Palenstinian official to make a representation to

1 this Court. The first, as the Court is aware, is
2 Mr. Hassan Abdle Rahman, who Judge Lagueux effectively
3 found misled the Court in terms of just service of
4 process. So what we have in terms of their motion, and
5 what they filed other than the representation of Mr.
6 Al-Kidwa, New Times articles basically saying that they
7 don't want to appear, and it's to me disingenuous for
8 several reasons.

9 First, just some very brief history. The
10 depositions and discovery were stayed in the spring of
11 last year. Following Judge Lagueux's ruling on
12 November 4, the stay was lifted. That was confirmed
13 both in a hearing that we had before your Honor on
14 December 12th this past year, and also in a letter that
15 your Honor wrote to counsel indicating very clearly
16 that the discovery stay stopped on November 4, and that
17 we had every right to proceed.

18 Your Honor granted an order. Mr. Schilling
19 and I negotiated the terms of that order over the
20 course of a month. It was entered on January 14. And
21 on January 14, the order says very clearly that we have
22 the right to set up depositions. We did exactly what
23 the order said. We did exactly what we intended and we
24 represented to the Court on December 12 what we would
25 do. The exact same deponents that were scheduled for

1 depositions last year ultimately stayed, with the exact
2 same people. We wrote a letter to Mr. Schilling and to
3 Mr. Clark on March 4 saying the depositions are coming
4 up in a few weeks, we want to confirm that they will go
5 forward. No response. No reply at all.

6 We have a motion for protective order. The
7 motion for protective order makes no mention at all of
8 the certification under Rule 26(c), a certification
9 that the parties confirmed. There is no representation
10 at all that some of the deponents can't be here, some
11 could. The time is no good. The date's no good. Even
12 the location is no good. You know, can we discuss
13 this? Nothing at all.

14 So the position, frankly, that the PLO and
15 the PA, and these officials that we've requested
16 depositions for, are simultaneously officials of both
17 organizations, the PA and the political party, the PLO.

18 It's somewhat disingenuous to now come in
19 and say that, you know, we just don't want to take
20 these depositions and when they've not gone through
21 what your Honor set forth on December 12th, what they
22 were told on December 12th, what Judge Lagueux
23 effectively told them on November 4 when he effectively
24 lifted the discovery stay, when the rules provide
25 certain mechanism to deal with objections to discovery

1 and to address concerns that might be reasonable under
2 the circumstances, we have nothing. And we had very
3 frank admissions by both Mr. Schilling and Mr. Clark in
4 this very room a month ago basically saying he spoke
5 with Mr. Arafat in mid-December and was told basically
6 don't go forward. So their position is that although
7 the law of this case is we have the right to go
8 forward, Judge Lagueux said emphatically on April 18th
9 this case was going forward, we have -- you know, we
10 have parties who think they can just rewrite the orders
11 of this Court, rewrite the rules of procedure, rewrite
12 the law of this case, and their position is very clear
13 that they won't do any discovery.

14 And I don't want to argue the other two
15 motions, but just to touch base, it's consistent with
16 the position in the other two motions. Not a single
17 piece of paper has been provided in discovery. Not a
18 single answer to interrogatories. Not a single
19 response to request for admissions. So their position
20 is we're denying the authority of this Court to do
21 exactly what Judge Lagueux said, bring this case to
22 discovery, bring this case to trial, and I would ask
23 that your Honor basically has, in a sense, has very
24 limited choices in light of -- in light of those
25 representations. In light of those representations,

1 there is no other alternative than to strike this
2 motion, or to deny this motion, to let us proceed with
3 the other two motions right now, because there is no
4 telling at all, you know, what could happen in the
5 First Circuit. And obviously if the First Circuit were
6 to issue a stay next week, or the week after, obviously
7 the parties would be, you know, governed accordingly.
8 But there is no reason now to stop this proceeding.

9 And just so we're absolutely clear, if I
10 could indulge the Court for one minute. The people
11 that we've asked to depose, besides Mr. Arafat, who is
12 obviously a sort of colorful figure, but we've asked to
13 depose very specific individuals who have been
14 identified very clearly with facts and very specific
15 information about the PA and the PLO support of
16 terrorism.

17 So, for instance, we've asked to depose
18 Mr. Razzi Jabali. We have a tape of Mr. Jabali
19 indicating that he provides Hamas terrorists support.
20 He puts them into his own security forces. We have
21 Mr. Dahlan. Mr. Dahlan met with Mr. Deif who is the
22 Hamas leader right around the time of the Ungar murder.
23 And we have information that he was given a green light
24 to specifically conduct terrorist activities in June of
25 1996. We've asked to depose Mr. Rajoub. His men, men

1 under his control, were the ones who gave the fake PA
2 police documents to the actual murders of the Ungars.
3 They're the ones who supervised the Tzurif gang, the
4 actual gang that was involved in killing the Ungars.
5 We've asked to depose Tawiq Tarrari. He gave money.
6 It's been proven and documented that he gave money and
7 weapons for specific terrorist attacks during this
8 period of time. Mr. Al-Hindi has been accused and has
9 documents of his same activities. Mr. Boughati is a
10 mastermind of a series of activities during this entire
11 period of time. Mr. Arafat, he is not just a person who
12 happens to be a Palestinian Authority, but he himself
13 has a direct hand in various forms of terrorism, and
14 more specifically his signature itself was on a piece
15 of paper indicating approval for the killing of
16 Americans after the fact. He rewarded Palestinian
17 terrorists in the form of compensation, financial
18 compensation, for killing Americans. And these
19 individuals involve not just in the policy level,
20 setting the policy for terrorism, but in the actual
21 operational level, actually approving operations,
22 giving the green light to operations, and to conducting
23 a campaign of terror in which a series of Americans
24 have been killed, to the extent that Congress passed a
25 law in 1999, 22 USC 2656(f) note, and that's the law

1 that requires the U.S. Government to monitor the PLO's
2 support for terrorism, the PA's support for terrorism,
3 and specifically conducted against Americans.

4 And lastly, your Honor, the inability to
5 come to this country to testify, I know that it could
6 not be Mr. Schilling or Mr. Clark who could make these
7 false representations. I'm sure it comes only from
8 their clients. But we've provided to the Court, I've
9 provided to counsel, and I think we previously provided
10 to the Court, but I wasn't exactly sure, so I just
11 wanted to double-check, that that was a deposition
12 transcript of Gassan Ramadan, an official of a PA
13 Ministry of the Environment. He came to court --
14 excuse me, he came to Washington on March 31, and he
15 testified in Washington at a deposition. He stayed
16 because he testified at the Bucheit trial that occurred
17 two days later. I mentioned that trial when we first
18 were in court a month ago on the Rule 55 motion, but I
19 did not have the deposition transcript. Now we have
20 the deposition transcript and we can prove to this
21 Court that the very day the depositions were supposed
22 to start in this case, we have PA officials been flown
23 into this country, testifying in this country, and
24 picking and choosing whether they can come to Rhode
25 Island, testify in depositions that have been court

1 ordered already, or whether they choose to go to a
2 different deposition and provide deponents for a
3 different deposition in a case against these very same
4 defendants in Washington.

5 THE COURT: Mr. Strachman, this was not one
6 of the people that you had notice for deposition.

7 MR. STRACHMAN: Absolutely not, your Honor.
8 Absolutely not.

9 THE COURT: But you're citing this as
10 evidence that, in fact, some officials have the ability
11 to travel to this country and appear for depositions if
12 they so desire.

13 MR. STRACHMAN: Absolutely, and appear at
14 trial, and in this same case, your Honor, we've also
15 listed in our response briefs there has been the
16 so-called assistant finance minister of the Palestinian
17 Authority testify at a court in Jerusalem in mid March
18 of this year, two weeks before the depositions were to
19 occur, and those are --

20 THE COURT: Was he one of the people that
21 you wished to depose?

22 MR. STRACHMAN: Absolutely not, your Honor.

23 THE COURT: But again the same point you're
24 saying some officials from the PA have the ability to
25 travel into other countries and appear in judicial

1 proceedings.

2 MR. STRACHMAN: Absolutely, and that goes to
3 the lack of good faith in terms of the response to the
4 deposition notices in this court. No one has said,
5 hey, we can't bring this official but we could bring
6 another person. We could bring people with records.
7 They won't do anything, but yet they can in two other
8 courts, and pursuant to the rules in two other
9 jurisdictions, they're perfectly able to do that. So I
10 think that's very significant for this Court to
11 consider, and this information has been out, at least
12 the information that we have received, has been made
13 known to the Palestinian Authority and the PLO at least
14 for the last month, and none of it has been rebutted,
15 and there hasn't even been a response to these
16 allegations. Thank you.

17 THE COURT: Do you want to respond briefly,
18 Mr. Schilling?

19 MR. SCHILLING: Briefly, your Honor.

20 THE COURT: All right, I'll let you respond
21 briefly.

22 MR. SCHILLING: Thank you. Gassan Ramadan,
23 it's true, works -- apparently works for the Ministry
24 of Environmental something or other. But he came here
25 as a private individual. The case had nothing to do

1 with the Ministry. It had nothing to do with his
2 duties at the Ministry. And it's not at all equivalent
3 to the depositions that the plaintiffs have noticed.

4 I make one technical point, your Honor. All
5 of the discovery has been against the Palestinian
6 Authority and the depositions themselves read the name
7 of the individual slash Palestinian Authority. The
8 notices are probably defective in some respect in not
9 designating the capacity in which the individuals are
10 being deposed, since they're not parties, but that's a
11 minor point. Thank you, your Honor.

12 THE COURT: Thank you, Mr. Schilling. Before
13 the Court is the Palestinian defendant's motion for
14 protective order. This motion has been referred to me
15 by Senior District Judge Lagueux for determination.

16 The defendants, by this motion, move for a
17 protective order against the taking of the depositions
18 of President Yassar Arafat and six other Palestinian
19 leaders. Mr. Schilling has argued that the motion
20 should be granted for a number of reasons beyond those
21 stated in the actual written memorandum.

22 I find that the motion should be denied for
23 the following reasons:

24 First and foremost, the defendant did not
25 respond at all to the request for discovery propounded

1 by the plaintiffs. When the plaintiffs noticed the
2 depositions and sought confirmation from the plaintiffs
3 whether or not the deponents would be appearing, their
4 letter was not responded to. This Court had indicated
5 that if there was a problem with the location or other
6 matters regarding the deposition that the defendants
7 could raise that, because the defendants had indicated
8 in prior court proceedings about the difficulty of the
9 deponents coming from Palestine, the conditions there,
10 and the Court was clear, as I recall, in indicating
11 that objections as to location or other matters
12 concerning the depositions would be -- at least the
13 defendants could raise that and the Court would address
14 it. But, in fact, the defendants have adhered to their
15 course of conduct, which is not to participate in terms
16 of the discovery process, not to participate in this
17 action by answering, which they are now in default.

18 I do not find that any of the reasons
19 offered by the defendants warrant issuance of a
20 protective order. I agree with the arguments made by
21 the plaintiffs in opposition to the motion for a
22 protective order, particularly the fact that the
23 support offered for the protective order is a letter
24 dated January 27, 2003, from Dr. Nassar Al-Kidwa,
25 Ambassador, permanent observer of Palestine, United

1 Nations. As plaintiffs correctly note, this is an
2 unsworn document. It's not an affidavit. The Court
3 read it, but I find that it is certainly insufficient
4 to persuade this Court that a protective order should
5 issue.

6 The arguments made by Mr. Schilling
7 regarding foreign immunity, the peace process, have
8 previously been made in their efforts to defeat
9 jurisdiction in this matter, and Judge Lagueux has
10 ruled against them. That matter, they are now seeking
11 review in the First Circuit.

12 I do not find, however, the fact that they
13 are seeking review in the First Circuit is a basis to
14 grant a protective order, particularly in view of the
15 fact that the defendants essentially ignored the
16 request for discovery and made no attempt to respond in
17 any manner to the request for discovery.

18 So the Court denies the Palestinian
19 defendant's motion for a protective order.

20 We'll now proceed to the motions for
21 judgment by default against the Palestinian Authority.
22 Mr. Strachman.

23 MR. STRACHMAN: Thank you, your Honor. Your
24 Honor, we filed discovery requests initially in January
25 of 2002. Discovery was stayed in the spring. The stay

1 was lifted by operation of Judge Lagueux's order. On
2 November 4, the Court indicated to the defendants on
3 December 12 that they were advised that any objection
4 to discovery may be waived for their failure to file
5 objections prior to December 12, as some of the
6 discovery was then, in fact, due.

7 We had a hearing. They asked for additional
8 time. Sixty days, I believe. The Court said no. The
9 Court said in response to my request that there'd be --
10 when the Court granted 45 days -- excuse me, when the
11 Court granted the defendants 45 days to respond to
12 discovery, in response to my request, the Court began
13 to tick that time, or start that time, from December
14 12th. So from December 12th they had an additional 45
15 days to respond to discovery.

16 Mr. Schilling and I spent a month of faxes
17 and letters back and forth. In fact, we're prompted, I
18 believe, by a call from your Honor's clerk, where is
19 the order, because he and I spent a month negotiating
20 the exact terms of an order that ultimately entered on
21 January 14. They were ordered to comply with discovery
22 by 45 days from December 12. They were specifically
23 told that they could object. They would have to
24 provide specific objections, and also, as I said
25 before, those objections could be waived, may be deemed

1 waived because they did not comply initially in the
2 first period of time. We waited. We didn't, you know,
3 file the motion on the 46th day or the 50th day or the
4 55th day. We waited to give them time. We get no
5 response at all, not a single response at all from them
6 other than a spate of pleadings which pretty much, in
7 terms of motion for reconsideration. In fact, they
8 asked to reconsider your Honor's ruling of December
9 12th. Your Honor denied that and said very
10 specifically that the reasons were for the reasons
11 provided in our, the plaintiffs', memorandum in
12 response to their motion for reconsideration. And that
13 indicated very clearly that they were refusing to
14 comply with discovery.

15 We filed a motion to enter default judgment
16 because as we've indicated the cases very clearly
17 support the proposition that when a party tells the
18 Court there will be no discovery, we are not complying,
19 we are not going to do anything consistent with the
20 rules of discovery, the rules of this Court with
21 respect to discovery, then the Court can take the most
22 drastic sanction. It need not wait yet another period
23 of time to allow compliance.

24 In fact, so we're very clear, the defendants
25 have not responded to our motion for default judgment

1 asking for more time. They haven't asked that
2 interrogatories 1 through 10 may be inappropriate, and
3 here's how we'd like to answer them. They haven't said
4 we need another month. They haven't come to the
5 plaintiffs and asked the plaintiffs could they be
6 tailored a certain way, could they be fashioned, we
7 can't answer subpart (a) but we can answer subpart (f).
8 None of that. So just like with the protective order
9 in terms of the depositions, they have said discovery
10 has come to a close. They will control how this case
11 is handled, not your Honor, not Judge Lagueux who said
12 just most recently on April 18th, this case will
13 proceed to discovery and to proceed to trial.

14 The interrogatories, the request for
15 production of documents, the request for admissions,
16 they have had for over a year. So again, it wasn't as
17 if we were here on December 12th and all of a sudden
18 for the first time they got a set of written
19 interrogatories. Although discovery was stayed, they
20 certainly had them.

21 And I find even more disingenuous the
22 position taken by Mr. Clark when we were here last
23 month and he acknowledged to the Court that he said he
24 had time to speak directly with Mr. Arafat about this
25 specific case. That was the main reason he went to see

1 him, according to his words. And instead of sitting
2 down with him with a legal pad and jotting out some
3 answers and trying to work in a good faith manner to
4 respond to discovery, they take the position that
5 they're just not going to respond at all, and that they
6 will dictate the terms of this litigation.

7 So again as I said in terms of the motion
8 for protective order, I think they sort of narrowed the
9 issues so that the Court really has only one response,
10 and that is entry of default judgment. A conditional
11 order doesn't make sense because they've told us
12 they're not going to comply.

13 We'd also ask that the Court impose
14 sanctions, both the sanction, if you will, in favor of
15 the Court so that the defendants can be punished for
16 their activity, also a sanction in the form of counsel
17 fees for plaintiffs' counsel for having to appear both
18 December 12th, and now for these discovery violations.
19 Thank you.

20 THE COURT: Mr. Schilling.

21 MR. SCHILLING: Your Honor, the matters at
22 stake here, and the concerns that are motivating the
23 defendants are very serious, and we are concerned again
24 with the peace process, and with the effect that
25 assuming burdens of litigation would have upon us and

1 the public perception of the Government.

2 We have consistently taken the position that
3 we are entitled to wait until there is a final
4 disposition of immunity and related issues. It has not
5 been a flat refusal, and I frankly don't know what will
6 happen, depending on what the Court of Appeals does,
7 what will happen in the future.

8 But I think that these are very serious
9 matters, and we don't intend any disrespect. We are
10 trying to protect the interests. There are millions of
11 people involved here. People are dying every day. And
12 we think -- we take all of this very very seriously.

13 I would mention one factor, your Honor, it's
14 almost a point of personal privilege. When we -- your
15 Honor has written a letter, and it's been concerned
16 with our understanding of when the stay ended. We put
17 in a motion way back asking for a stay, and it
18 contained a second paragraph which addressed when the
19 discovery obligation would resume if the stay ended.
20 The order that your Honor entered was an order that
21 simply said the matter is stayed, and didn't address
22 the second point of when -- what would happen when the
23 stay ended and how long we would have to make
24 discovery. That was the confusion that was in my mind
25 at the hearing. Do you recall this, your Honor,

1 because I --

2 THE COURT: I recall sending the letter
3 following the hearing, Mr. Schilling. My letter was
4 not intended to imply that you had acted improperly or
5 had not been candid with the Court, but it was more of
6 an acknowledgement that during the hearing I just
7 didn't have the order in front of me and I felt it
8 important to state clearly the Court's position. But
9 my letter was not intended as criticism of you. It
10 was, if anything, an attempt to make clear to counsel
11 something that I should have made clear during the
12 hearing, and had failed to do so because I did not have
13 the order in front of me at the time of the hearing.
14 After the hearing, I looked at it and that's the reason
15 I sent the letter. But the letter should not be
16 considered by you as criticism.

17 MR. SCHILLING: Okay. But the source of the
18 confusion was that our suggested proposed order was in
19 two parts and the second part was not addressed, and
20 there was, I think, at about this time our motion for
21 reconsideration was pending, which asked for a stay,
22 and that created the uncertainty that we expressed at
23 the hearing. Thank you, your Honor.

24 THE COURT: All right, Mr. Schilling.

25 MR. STRACHMAN: May I just respond for a

1 moment, Judge?

2 THE COURT: You may, Mr. Strachman.

3 MR. STRACHMAN: I didn't point out just a
4 moment ago, but I did in our filings with regard to the
5 depositions. In the Bucheit case, we've represented
6 that there was an exchange of discovery, and that
7 discovery was made and complied with in that case. And
8 we represented that some time ago with our filings.
9 That also has not been rebutted. So it seems clear to
10 me that the PA has the ability to comply with discovery
11 requests down in Washington in the cases against
12 identical parties, both the PA and the PLO, and we know
13 that they were able to search records and find
14 documents to produce in discovery. But in this case,
15 despite a court order, they can't do so.

16 THE COURT: The Court has looked at the
17 case law concerning default judgments, entry thereof,
18 and it's clear that the entry of judgment by default,
19 the entry of a default judgment is not favored. It is
20 a last resort. The case law lists factors the Court
21 should consider in deciding whether or not to grant a
22 motion for entry of default judgment.

23 I find that almost all the factors have been
24 satisfied with the exception that the Court has not
25 explicitly warned the defendants of something that the

1 Court believes is probably obvious, that a failure to
2 comply with discovery requirements can result in the
3 entry of default judgment. The plaintiffs have cited
4 case law that indicates that this is not an essential
5 requirement for the entry of default judgment. It's
6 not absolutely necessary that the Court first
7 explicitly warn a party who is being noncompliant, that
8 the continued noncompliance will result in the entry of
9 default judgment. Plaintiffs have cited case law which
10 would indicate the Court is within its rights to order
11 a default judgment even though the Court has not
12 previously explicitly warned the defendants that a
13 failure to comply with their discovery obligations will
14 result in the entry of default judgment.

15 Notwithstanding that, however, I have
16 concluded I am going to make that explicit warning to
17 the defendants, that their continued failure to comply
18 with their discovery obligations may well result in the
19 entry of default judgment, and that the reasons that
20 Mr. Schilling has mentioned in his arguments, such as
21 back last December, as I understood his argument, one
22 of the reasons the defendants were not responding to
23 their request for discovery was there was a pending
24 motion for reconsideration before Judge Lagueux, and
25 they had hopes, I gather, I infer from his argument,

1 they had hopes that he would grant that motion and,
2 therefore, there would be no need to respond to the
3 request for discovery, and he mentioned that the motion
4 for reconsideration was pending for five months and
5 suggested, perhaps, that while it was pending, the
6 defendants could not respond to discovery or were
7 uncertain.

8 Well, that situation has totally changed.
9 Judge Lagueux has denied the motion for reconsideration
10 and made abundantly clear that this case is going
11 forward. There can be no doubt in the defendants'
12 mind, and I want there to be no doubt in the
13 defendants' mind, that a continued failure to comply
14 with their discovery obligations in this matter may
15 well result in the entry of default judgment.
16 Particularly in view of the fact, as I've indicated, I
17 find almost all the other factors that would be
18 addressed by a court in considering whether to enter
19 default judgment are already present.

20 I'm going to continue this matter 60 days.
21 The defendants are ordered to comply with their
22 discovery obligations. They are to respond to the
23 request for interrogatories, the request for
24 admissions, the request for productions. They are to
25 communicate to the plaintiffs when and where they will

1 produce the named deponents. They shall communicate
2 that to the plaintiffs within 30 days.

3 I also want defendants to be aware that the
4 Court believes that the plaintiffs are entitled to
5 attorneys fees for the additional work that has
6 resulted from their failure to comply with discovery
7 requests to date. The fact that counsel have had to
8 file additional motions, I will address that matter at
9 a future date. But I want the defendants to be clear
10 I'm not simply giving them an extra 60 days at no cost.
11 They have failed to comply with their discovery
12 obligations. This has necessitated the plaintiffs
13 incurring additional attorneys fees and the defendants
14 are responsible for those fees.

15 Miss Saucier, may I have two dates, one 30
16 days from today and one 60 days from today, please.
17 Court dates, please.

18 Defendants are advised that they are to
19 comply with the discovery obligations within 60 days by
20 July 14, 2003. The Court will continue this hearing
21 until, the hearing on the motion for judgment by
22 default, until that date. The defendants are to advise
23 the plaintiffs by June 16th of when and where the named
24 deponents can be deposed. Since the notices are for
25 the District of Rhode Island, the defendants seek to

1 have the depositions take place other than the District
2 of Rhode Island, defendants must file a motion seeking
3 that relief and setting forth why it should take place
4 in the District of Rhode Island. Is that clear,
5 Mr. Schilling -- why it should take place other than in
6 the District of Rhode Island.

7 Mr. Strachman, you may prepare an order
8 reflecting the fact that the defendants' motion for a
9 protective order has been denied by the Court. The
10 Court will prepare its own order reflecting the
11 continuance of the two motions for judgment by default.
12 The order will contain the dates that I've just
13 announced and the requirements the Court has set.

14 Is there anything further, Mr. Strachman?

15 MR. STRACHMAN: Just wondering, your Honor,
16 in light of the representations that have been made if
17 it might be more expeditious if we could have a
18 representation by the defendants within the next ten
19 days as to whether they are complying at all because if
20 they take the position that they've had for the last
21 six months, that they will not comply and not submit to
22 discovery, then it might make sense not to wait until
23 July to hear that. If we were told they're going to
24 maintain the same position, in other words, not the
25 actual scheduling of the depositions, but whether they

1 are going to even engage in that process, ten days
2 should be sufficient for the defendants to communicate
3 with their counsel and learn whether they are taking a
4 position other than the position communicated to
5 Mr. Clark in the middle of December, and that would
6 advance this matter, and then we would not have to be
7 here on July 14th just to learn what I think we all
8 would expect to be the same position.

9 THE COURT: Mr. Schilling.

10 MR. SCHILLING: I think the 30 days and the
11 60 days are tough enough, your Honor. I don't -- I
12 think that this is an unrealistic suggestion by
13 Mr. Strachman.

14 THE COURT: I've made my ruling,
15 Mr. Strachman.

16 MR. STRACHMAN: Thank you.

17 THE COURT: The Court will be in recess.

18 (RECESS)
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C E R T I F I C A T I O N

I, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in cursive script, appearing to read "Alfred Gallucci", is written over a horizontal line.

ALFRED GALLUCCI, COURT REPORTER